No. 93-1154

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

In re: CONTINENTAL AIRLINES, INC., *et al.*,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALICE J. FISCHER, ESQ.
(Counsel of Record)
DANIEL E. MUSE, ESQ.
City Attorney

ROBERT F. STRENSKI, ESQ.
Assistant City Attorney

Office of the City Attorney
353 City and County Building
Denver, Colorado 80202-5375
Telephone: (303) 640-3611
Facsimile: (303) 640-5609

Attorneys for Petitioner, Patricia Beer, Manager of Revenue of the City and County of Denver

March 1994

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether an opinion of the Court of Appeals must be a published opinion in order to be subject to consideration for Review on Writ of Certiorari.

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ARGUMENT

I. Unpublished Cases in the Court of Appeals may be reviewed by the United States Supreme Court.

Respondents ("Continental") contend that because the United States Court of Appeals for the Third Circuit ("Court of Appeals") has designated its decision in this matter as "not for publication", the Court of Appeals' decision automatically does not conflict with the opinion of any other court, and thus, is not subject to review on writ of certiorari. *In re Continental Airlines, Inc.*, No. 93-7088 (3rd Cir. September 20, 1993) (not selected for publication), reh'g denied (October 21, 1993). App. A1-A24. This theory has no legal basis, and conflicts with the obvious purpose of Rule 10.1, United States Supreme Court Rules ("Supreme Court Rules"), and of 28 U.S.C. § 1254(1) (1940 ed.): To place review on writ of certiorari within the sound judicial discretion of the United States Supreme Court.

This Court is granted broad jurisdiction to review cases in the courts of appeals under 28 U.S.C. § 1254 (1940 ed.) ("By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."). Section 1254 and Supreme Court Rule 10.1 do not distinguish between published and unpublished opinions. Rule 10.1 states:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

> The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals *has rendered a decision* in conflict with a decision of another United States court of appeals on the same matter; *or has decided a federal question* in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court,* as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals *has decided an important question of federal law* which has not been, but should be, settled by this Court, *or has decided a federal question* in a way that conflicts with the applicable decisions of this Court.

(emphasis added).

Any contention that only published opinions of the courts of appeals are subject to certiorari review is incorrect. Indeed, in the past seventeen months, this Court has granted certiorari on and decided at least three cases where the decision of the court of appeals, from which review was sought, was not selected for publication. *Weiss v. United States,* No. 92-1482, ___ U.S. ___, 127 L.Ed.2d 1 (January 19, 1994) (Decided together with *Hernandez v. United States,* certiorari granted on unpublished Military Court of Appeals decision); *United States v. Edge Broadcasting Co.,* No. 92-486, ___ U.S. ___, 113 S.Ct. 2696,

125 L.Ed.2d 345, 354 n. 3 (June 25, 1993) ("We deem it remarkable and unusual that although the Court of Appeals [4th Cir.] affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion."); *Shalala v. Schaefer*, No. 92-311, ___ U.S. ___, 113 S.Ct. 2625, 125 L.Ed.2d 239, 246 (June 24, 1993) ("The Eighth Circuit . . . affirmed the District Court in an unpublished per curiam opinion. . . . We granted certiorari.").

This Court's review on certiorari should not turn on the differences among circuit courts' local rules, which differ in their standards for determining the publication of their opinions. For example, Local Rule 36.2.5 of the United States Court of Appeals for the First Circuit provides, "If a District Court opinion in a case has been published, the order of the court upon review *shall* be published. . . . " U.S.C.S. Ct. App. 1st Cir. R. 36.2(b)(5) (1993) (emphasis added). *See* U.S.C.S. Ct. App. 7th Cir. R. 53(c)(1)(v) (1993); U.S.C.S. Ct. App. D.C. Cir. R. 14(a)(6) (1993) (opinion published when decision reverses published District Court opinion); U.S.C.S. 10th Cir. R. 36.2 (1993) (When an opinion below has been published, this court will ordinarily designate its disposition for publication.) In this matter, both the District Court and Bankruptcy Court opinions were published. *In re Continental Airlines, Inc.*, 138 B.R. 430 (Bankr.D.Del. 1992); rev'd 23 Bankr.C.D. 1499, 149 B.R. 76 (D.Del. 1993).

Moreover, the Third Circuit's opinion in this matter may be cited as precedent or as persuasive authority in

unrelated cases before other circuit courts. The Fifth Circuit's Local Rule 47.5.3 reads "Unpublished opinions are precedent. . . . If an unpublished opinion is cited, a copy shall be attached to each copy of the brief." U.S.C.S. Ct. App. 5th Cir. R. 47.5.3 (1993). Similarly, Local Rule 10(f) of the Sixth Circuit states that "If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that will serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court." U.S.C.S. Ct. App. 6th Cir. R. 10(f) (1993). The Eleventh Circuit allows unpublished opinions to be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion, or response. U.S.C.S. Ct. App. 11th Cir. R. 36-2 (1993).

Continental relies on Rules 5.1.3 and 5.5.1 of the Court of Appeals' Internal Operating Procedures ("IOP") to support its position. These Rules do not provide a legal basis for the Supreme Court to deny review on certiorari. Rule 5.1.3 merely states, "When a majority of the panel believes that publication of the opinion is not necessary, the opinion may be written as a signed opinion, but designated as ~~not for~~ publication. Such an opinion, after approval by the panel, circulates to all active judges as provided by IOP 5.3." Similarly, IOP Rule 5.5.1 provides, in part, that the decision of whether to publish an opinion lies within the discretion of two of the three Third Circuit panel judges.

A lower federal or state court cannot avoid review in this Court simply by not selecting its opinions for publication. Supreme Court Rule 10.1 does not intend to limit the broad discretion and jurisdiction of this Court to the review of only published opinions. Therefore, it is axiomatic that the jurisdiction of the United States Supreme Court extends over both published and unpublished opinions.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

ALICE J. FISCHER, ESQ.
(Counsel of Record)
DANIEL E. MUSE, ESQ.
City Attorney

ROBERT F. STRENSKI, ESQ.
Assistant City Attorney

Office of the City Attorney
353 City and County Building
Denver, Colorado 80202-5375
Telephone: (303) 640-3611
Facsimile: (303) 640-5609

Attorneys for Petitioner,
Patricia Beer, Manager of Revenue
of the City and County of Denver

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